NO. 48003-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

In re the Marriage of:

BRYCE LEMMONS,

Petitioner - Respondent,

vs.

JESSICA LEMMONS,

Respondent - Appellant.

BRIEF OF RESPONDENT BRYCE LEMMONS

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B. STATEMENT OF THE CASE

On June 15, 2015, Appellant Jessica Lemmons and Respondent Bryce Lemmons appeared before the Cowlitz County Superior Court to argue Appellant's Motion for Trial Setting. RP 1-50; CP 26. Following argument the court denied the motion. RP 37; CP 26-28. On August 3, 2015, the parties appeared before the court for entry of findings denying Appellant's Motion for Trial Setting. CP 226-28. The findings and order stated:

> Respondent, JESSICA LEMMONS, by and through her counsel of record, CHELSEA C. BALDWIN, filed a Motion and Declaration for Trial Date to set a trial on the remaining issues before the court on June 5, 2015. Respondent, BRYCE LEMMONS, represented by NOELLE A. McLEAN objected. The matter was heard on June 15, 2015.
>
> **I. FINDINGS**
>
> a. This matter was filed on August 30, 2010. Petitioner, BRYCE LEMMONS filed a Summons and Petition for Dissolution of Marriage as well as a Proposed Parenting Plan and additional supporting documents.
>
> b. Motions have been filed by both parties from 2010 through the current date.
>
> c. Petitioner, BRYCE LEMMONS, filed a Docket Notice to establish a trial date on June 16, 2014. (Clerk's papers 90). Based upon communications between the attorneys to move the settlement negotiates off dead center, resulted in an agreed bifurcation of the dissolution.
>
> d. The court approved a bifurcated Dissolution process that allowed the entry of a Decree of Dissolution and Findings of Fact and Conclusions of Law but specifically reserved the Parenting Plan and Order of Child support to be determined at a later date. The parties entered an agreed Decree of Dissolution and Findings of Fact and Conclusions of Law on June 30, 2014. (Clerk's papers 93 and 94).

e. As of the date of the hearing on June 15, 2015, the court had not entered a Final Parenting Plan or a final Order of Child Support.

f. Respondent, JESSICA LEMMONS, requested the remaining matters be set for trial and filed a Docket Notice to establish a trial date on May 22, 2015. (Clerk's papers 143). The court notes the reunification process has just recently commenced.

g. Petitioner objected to setting a trial date and the court set the matter for determination on June 15, 2015, and requested Respondent file a motion.

h. Respondent, JESSICA LEMMONS, filed a Motion and Declaration for Trial Date on June 5, 2015 and requested a trial date in October of 2015. The motion was heard on June 15, 2015.

i. Many of the parties' disputes were resolved by bifurcation and the entry of the agreed Decree of Dissolution but the children's time with each parent was not resolved.

j. The court issued a reunification order. This case is not typical or average, as this is a complex reunification case with many moving parts. The court needs a holistic view of the reunification process in order to make findings and ruling at trial related to the best interest of the children. While the court hoped the reunification process would move faster, the involved experts are in the best position to make determinations on the children's needs through the reunification process. There is an appearance of delay being interposed in the process by the mother, with missed visits and her request for the month of July 2015 off for vacation with the children. The path to reunification is complicated and there are now many counselors involved. The court expects the reunification process to develop vital information for the court to make a fully developed ruling in the children's best interests related to the parent plan.

k. While a typical case could be ready for trial in five (5) months (e.g., October 2015), there has been no scheduling order entered and the reunification process has not been completed. Accordingly, given the complex nature of this case, this frame is unreasonable in this particular circumstance.

l. A fully developed final parenting plan is in the children's best

interest to avoid and/or reduce future litigation. The reunification process will aid in the establishment of a final parenting plan.

m. The court is not in a position to schedule a trial date until the reunification process has been substantially advanced.

II. ORDER

It is hereby Ordered:

Respondent's request for a trial is denied

CP 26-28.

Appellant subsequently obtained discretionary review of this order. *See* Ruling Granting Motion for Discretionary Review in Part and Accelerating Review.

C. ARGUMENT

I. APPELLANT'S FAILURE TO ASSIGN ERROR TO THE TRIAL COURT'S FINDINGS OF FACT MAKES THOSE FINDINGS VERITIES ON APPEAL.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In the case at bar Appellant seeks relief from the trial court's order denying Appellant's motion to set a trial date to determine a permanent parenting plan. *See* Brief of Appellant. As part of that order the trial court entered 13 findings of fact. CP 26-28. Appellant did not assign error to any of these findings. *See* Brief of Appellant. As a result, these findings stand as verities on appeal.

II. UNDER THE FACTS OF THIS CASE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID NOT VIOLATE WASHINGTON CONSTITUTION, ARTICLE 1, § 10 WHEN IT REFUSED TO SET A TRIAL DATE FOR THE PERMANENT PARENTING PLAN UNTIL THE REUNIFICATION PROCESS WAS CLOSER TO BEING COMPLETE.

Under Washington Constitution, Article 1, § 10, litigants in the State of Washington are entitled to "justice . . . without unnecessary delay." However, in dissolution proceedings, trial courts have broad discretion when setting dissolution proceedings for trial, particularly those involving children because the foremost goal of the court is the best interests of the children. *In re Marriage of Possinger*, 105 Wn.APp. 326, 19 P.3d 1109 (2001). Thus, when a trial court is convinced that it is in the best interests of the children, that court may enter a temporary custody order and retain jurisdiction to later enter a permanent order. *Little v. Little*, 96 Wn.2d 183, 194, 634 P. 2d 498 (1981). *See Phillips v. Phillips*, 52 Wn.2d 183, 194 P.2d 498 (1981) ("this court has expressly approved such continuances in custody matters where the trial court, in its sound discretion, deems it wise to postpone the final determination until after a trial period during which the effectiveness and propriety of its temporary order can be observed.")

In *Possinger, supra*, the court stated the following concerning the trial court's discretion to postpone child custody decisions:

> It would be strange indeed to construe an act designed to serve the best interests of the children of divorcing parents in such a manner as to require trial courts to rush to judgment on insufficient evidence with

> respect to the children's best interests, or to ignore the fact that the lives of the parents are in such a state of transition that the children's best interests would be served by deferring long-term parenting decisions for a reasonable period of time following entry of a decree of dissolution of marriage.
>
> Accordingly, we conclude that the Act is consistent with prior policy as pronounced by our Supreme Court in *Potter*, *Phillips* and *Little*, and hold that where the best interests of the child requires it, the trial court is not precluded by the Parenting Act from exercising its traditional equitable power derived from common law to defer permanent decisionmaking with respect to parenting issues for a specified period of time following entry of the decree of dissolution of marriage.

In re Marriage of Possinger, 105 Wn.App. at 336-37.

For example, in *Potter v. Potter*, 46 Wn.2d 526, 282 P.2d 1052 (1955), the trial court entered a temporary parenting plan giving custody to the mother. However the trial court was not convinced that she was a fit parent. As a result the court set the matter out for five months for review of the mother's actions during that period of time. The mother then appealed, arguing in part that the trial court had abused its discretion when it refused to issue a permanent parenting plan. However, the Court of Appeals affirmed, noting as follows:

> Before the permanent care, custody, and control of a child (subject to modification) is awarded in a divorce action, there must be a finding of fact to the effect that the person being awarded such custody is a fit and proper person to be entrusted with the upbringing of the child. *Hansen v. Hansen*, 43 Wash.2d 520, 262 P.2d 184.6 Under circumstances which reveal no abuse of discretion, however, the trial court may postpone the making of a custody determination pending a trial custody period, ***or the happening of some relevant future event.*** *See Allen v. Allen*, 28 Wash.2d 219, 182 P.2d 23; *Olson v. Olson*, Wash., 280 P.2d 249.

Potter v. Potter, 46 Wn. 2d at 528 (emphasis added).

Similarly, in *Olsen v. Olsen*, 46 Wn. 2d 246, 280 P.2d 249 (1955), the trial court was presented with a child custody case in which it determined that the mother was currently incapable of providing the child an adequate home environment. While the court found that the father could provide adequate care, it was quite concerned because the father had a history of abusing alcohol and had only been sober for a few months. In this case the trial court gave temporary custody to the state. Ultimately, the Washington Supreme Court held that since the father was presently fit to have custody of the child, the trial court had no authority to give custody to the state. However, in its opinion, the appellate court noted that it would be quite appropriate for the trial court to enter a temporary custody decree and put the matter over to a date in the future for consideration of a final decree. The court held:

> The trial court in its memorandum opinion indicated that it was not satisfied that the father had such command of himself as to be without danger of again using liquor to excess. It further indicated in its order that under certain conditions the mother might again be entitled to the physical custody of the child. Under the circumstances, the trial court was right in believing that it was entirely possible that the father could reform; however, this reformation should be evidenced by more than a few months of conduct free from criticism, and the court should have substantial evidence of such reformation before the legal custody should be given to one who will have the responsibility of the physical, moral, and spiritual care of a growing child. In view of these circumstances, the court would have been justified in awarding temporary custody to the father and continuing the hearing until a later date when it could determine which environment was better suited to the child's welfare.

Olson v. Olson, 46 Wash. 2d at 250-51, 280 P.2d 249 (1955); *See also In re*

Marriage of Possinger, supra (no abuse of discretion in a delay from March of 1998 to October of 1999 before entering a permanent custody decree).

As these cases reveal, a trial court's discretion to enter a temporary order and defer a final decision on the issue of custody until "the happening of some relevant future event" is contingent upon the court's belief that this action is in the best interests of the child. This is precisely what the trial court did in this case. The following findings specifically addressed the trial court's belief that deferring trial setting was in the best interest of the children. The court held:

> j. The court issued a reunification order. This case is not typical or average, as this is a complex reunification case with many moving parts. ***The court needs a holistic view of the reunification process in order to make findings and ruling at trial related to the best interest of the children.*** While the court hoped the reunification process would move faster, the involved experts are in the best position to make determinations on the children's needs through the reunification process. There is an appearance of delay being interposed in the process by the mother, with missed visits and her request for the month of July 2015 off for vacation with the children. The path to reunification is complicated and there are now many counselors involved. ***The court expects the reunification process to develop vital information for the court to make a fully developed ruling in the children's best interests related to the parent plan.***
>
> k. While a typical case could be ready for trial in five (5) months (e.g., October 2015), there has been no scheduling order entered and the reunification process has not been completed. Accordingly, given the complex nature of this case, this frame is unreasonable in this particular circumstance.
>
> l. ***A fully developed final parenting plan is in the children's best interest to avoid and/or reduce future litigation.*** The reunification process will aid in the establishment of a final parenting plan.

m. The court is not in a position to schedule a trial date until the reunification process has been substantially advanced.

CP 27-28 (emphasis added).

In these four findings the trial court states on three separate occasions that it was refusing to set a trial date in order to allow the reunification process to proceed, which the court specifically found was in the best interests of the children. These findings are reinforced by the trial court's oral ruling on the motion, which was as follows:

> And I'm really sensitive to the fact that it's taking such a long time to get to trial. You know, kids do need certainty – certainty. They do need that, and that promotes their well-being. Right now, there's the reunification direction and, at least at the time that the Court made the Order, ***the Court was of the opinion that reunification would be in the children's best interests and that's why the Court ordered reunification counseling. So, we're going to give that an opportunity to – to more fully develop and see how that goes.***
>
> So, as far as the Motion to set a trial date for October of 2015, I'm going to deny that request. We're in the third phase, apparently, of the reunification process and just recently visits have started, and – and I think tied to that is Ms. Rosen's request related to the counselors and the like, to further that end. So, it's a long way of saying that I'm denying the request to set a trial date at this point.

RP 37-38 (emphasis added).

As this record makes abundantly clear, the trial court denied the motion upon its belief that doing so was, as it said at least four times, "in the children's best interests." Given these findings by the trial court, the only issue that remains is whether or not the trial court abused its discretion when it refused to set a specific date for trial. An abuse of discretion occurs when

the trial court's decision rests on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In addressing the question of discretion, it should be noted that the trial court did not simply refuse to ever set a trial date. Rather, it refused to currently set a date until the completion or near completion of a specific event. That event was the completion or near completion of the reunification process. As the court recognized in *Potter, supra*, a trial court "may postpone the making of a custody determination pending . . . the happening of some relevant future event." *Olson*, 280 P.2d 249. In this case that is precisely what the trial court did. Thus, in this case the trial court's decision did not rest on "untenable grounds or untenable reasons" and therefore it did not constitute an abuse of discretion.

III. THE SUPERIOR COURT'S REFUSAL TO SET A TRIAL IN THIS CASE DID NOT VIOLATE CCLCR 40(B) AND TO THE EXTENT THE RESPONDENT MADE AN ORAL OBJECTION TO TRIAL SETTING AS OPPOSED TO A WRITTEN OBJECTION, APPELLANT HAS NO REMEDY.

In this case appellant argues that the trial court violated "Cowlitz County Local Rule (CCLCR) 40(b)(iii) by removing the case from the trial setting docket and shifting the burden away from the party objecting to the trial date." *See* Issues Pertaining to Assignment of Error, Issue 2, Brief of Appellant page 1. As the following examination of the rule reveals, the trial court did not violate any of the rule's provisions.

In CCLRC 40(b)(ii)&(iii) the rule regulates how civil cases in Cowlitz County are to be set on the court's "administration's trial assignment docket." These two provision state:

> (ii) No cause appearing on the assignment docket will be set for trial unless there is a response filed, there has been a Certificate of Readiness filed which is not contested, and at least one of the parties or their attorney either personally appears or contacts the court on or before the commencement of the docket.
>
> (iii) Should any party believe the case is not yet ready for trial, or that the Case Scheduling Order has not been completed, they shall file and serve an objection to the Certificate of Readiness and note the matter for hearing on the appropriate motion calendar. This will remove the matter from the Court Administration's trial assignment docket.

CCLRC 40(b)(ii)&(iii).

As the rule states, the Superior Court in Cowlitz County is only supposed to set a matter for trial if "there is a response filed, there has been a Certificate of Readiness filed which is not contested, and at least one of the parties or their attorney either personally appears or contacts the court on or before the commencement of the docket." In this case there was no written response filed on the date of trial setting, and opposing counsel appeared and contested the certificate of readiness. Thus, under the rule, the matter was not ready to be set for trial.

It is true that under CCLRC 40(b)(iii), a party who believes a case is not yet ready for trial is supposed to serve an objection to the certificate of readiness and note the matter for a hearing. Although not specifically stated,

the rule can be read to imply that this objection should be made in writing. In this case Respondent did appear in court and make an oral objection, which the trial court noted. At that point the court set the matter for hearing as was contemplated under the rule.

In fact, the rule itself does not set out a remedy for making an oral objection to a certificate of readiness instead of a written objection. The reason for this failure is undoubtedly that the purpose of the rule is for the convenience and efficient functioning of the court, not to create rights and remedies for the parties. Thus, there is no remedy for respondent's alleged failure to file a written objection as opposed to making an oral objection.

In this case Appellant also claims that the trial court shifted the burden of proof when it "ordered" Appellant to file a motion and memorandum to support her request to set a trial. Brief of Appellant, page 8. In fact, the undisputed findings from the trial court do not support this claim. Finding g from the June 15, 2015, hearing states:

> g. Petitioner [Bryce Lemmons] objects to setting a trial date and the court set the matter for determination on June 15, 2015 and requested Respondent [Jessice Lemmons] file a motion.

CP 27.

As this finding clarifies, the trial court did not order Appellant to file a motion to get a hearing for trial setting. Rather, the court set a motion date to hear both Appellant's request to set a trial date and Respondent's

objection. In fact, the court's use of the term "motion" appears somewhat inartful because the trial court, in reliance upon the local court rule, was setting the matter for a hearing upon the request and objection to set the trial. It appears that what the trial court was "requesting" was some sort of memorandum and affirmations in support of Appellant's request and in reply to Respondent's objection. This "request" was not an "order" and it did not shift the burden of proof.

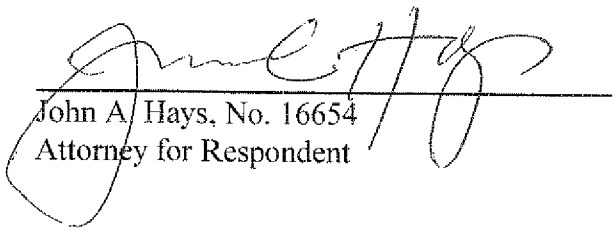
Ultimately, this court should decline to even address this issue because Appellant has failed to perfect the record sufficiently to argue it. In making this claim Appellant is objecting to the trial court's actions from the hearing held on May 22, 2015. By failing to secure a transcript of that hearing, Appellant has left this court with a record insufficient to make such a determination. *See Olmsted v. Mulder*, 72 Wn.App. 169, 183, 863 P.2d 1355 (1993) (the burden is on the party aggrieved by a court decision to perfect the record so this court has before it all the evidence necessary to resolve the issue).

D. CONCLUSION

For the reasons set out in this brief this court should deny appellant's requested relief.

DATED this 22nd day of April, 2016.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Respondent

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 10

Justice in all cases shall be administered openly, and without unnecessary delay.

CCLCR 40(b)
ASSIGNMENT OF CASES

(b) Methods.

(i) Trial Assignment. Court Administration shall schedule all trial dates which will be typically be set the "week of". The moving party shall serve and file a request for a Trial Setting/Certificate of Readiness substantially in the form set forth at the end of these civil rules. The parties shall appear on the appropriate trial assignment docket and Court Administration will schedule the trial. Proof of service of the trial setting notice shall be filed with the clerk by the moving party prior to the time of trial setting. If any issue arises which prevents Court Administration from issuing a trial date and/or a Trial Scheduling Order, the parties shall note the matter onto the appropriate Civil or Domestic Relations Motion Docket for resolution by the presiding judge.

(ii) No cause appearing on the assignment docket will be set for trial unless there is a response filed, there has been a Certificate of Readiness filed which is not contested, and at least one of the parties or their attorney either personally appears or contacts the court on or before the commencement of the docket.

(iii) Should any party believe the case is not yet ready for trial, or that the Case Scheduling Order has not been completed, they shall file and serve an objection to the Certificate of Readiness and note the matter for hearing on the appropriate motion calendar. This will remove the matter from the Court Administration's trial assignment docket.

(iv) In the event one or more attorneys to the cause fail to appear for trial setting, after being given proper notice of the application by the movant, and without advising the court, in writing, of non-available trial dates, the

trial date shall be assigned, absent good cause shown, and subject to whatever reasonable terms may be applied by the court. If no attorney or party appears for the trial assignment, the assignment request will be stricken. An attorney may have a trial set without personal appearance provided they furnish a letter to the file indicating their intention not to personally appear and suggesting time preferences, restrictions, estimated length or other relevant information.

(v) The initial request for trial setting shall be accompanied by a list of the names and addresses of all persons entitled to notice. All parties have the obligation to inform the Court Administration promptly of any errors or changes in this list.

(vi) Trial Setting / Certificate of Readiness and Trial Scheduling Order Format.

COURT OF APPEALS OF WASHINGTON, DIVISION II

In re the Marriage of:,	
BRYCE LEMMONS **Respondent**	**NO. 48003-4-II**
vs.	**AFFIRMATION OF SERVICE**
JESSICA LEMMONS, **Appellant.**	

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Joshua Baldwin
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Dated this 22nd day of April, 2016, at Longview, WA.

Diane C. Hays

HAYS LAW OFFICE

April 22, 2016 - 4:46 PM

Transmittal Letter

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